

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

CHARLES MAKI,

Case No.: 3:18-cv-00365-MMD-WGC

Plaintiff,

REPORT & RECOMMENDATION OF U.S. MAGISTRATE JUDGE

V.

SMUCK, *et al.*,

Defendants.

This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

Plaintiff has filed an application to proceed in forma pauperis (IFP) (ECF No. 5) and *pro se* amended complaint (ECF No. 4).

It is recommended that the IFP application be denied, and that the action be dismissed because while Plaintiff brings this as a civil rights action under 42 U.S.C. § 1983, his claims sound in habeas.

All the claims stem from the sentencing in his criminal case that was prosecuted in the Second Judicial District Court. He alleges that the judge and prosecutor violated his Fifth Amendment right when they allowed a non-victim to testify at sentencing; that his defense attorney violated his Sixth Amendment right to effective assistance of counsel as well as his right to equal protection of the laws when she mishandled his case; and that his Eighth Amendment right to be free from cruel and unusual punishment was violated because he was given a de facto death sentence. In his request for relief, he asks for his criminal charges to be vacated and that his conviction be removed from his records.

1 Since Plaintiff requests that his conviction and sentence be declared invalid, his claims are
2 barred from being brought under section 1983. *Heck v. Humphrey*, 512 U.S. 477, 480-82 (1994);
3 *Wilkerson v. Wheeler*, 772 F.3d 834, 840 (9th Cir. 2014). Therefore, the action should be
4 dismissed. Plaintiff should be advised that he may file a habeas petition asserting these arguments
5 after exhausting his State remedies.

6 **RECOMMENDATION**

7 **IT IS HEREBY RECOMMENDED** that the District Judge enter an order: **DENYING**
8 Plaintiff's IFP application (ECF No. 5); **DISMISSING** this action without prejudice; and, advising
9 Plaintiff that he may file a habeas petition after exhausting his State remedies.

10 The Plaintiff should be aware of the following:

11 1. That he may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to
12 this Report and Recommendation within fourteen days of being served with a copy of the Report
13 and Recommendation. These objections should be titled "Objections to Magistrate Judge's Report
14 and Recommendation" and should be accompanied by points and authorities for consideration by
15 the district judge.

16 2. That this Report and Recommendation is not an appealable order and that any notice of
17 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed
18 until entry of judgment by the district court.

19 DATED: November 6, 2018.

20 
21 WILLIAM G. COBB
22 UNITED STATES MAGISTRATE JUDGE
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